

Diet Pepsi Drinkers Ask 2nd Circ. To Revive False Ad Suit

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Law360 (August 6, 2018, 4:44 PM EDT) -- A pair of consumers Friday asked the Second Circuit to revive their putative class action accusing Pepsi-Cola Co. of misrepresenting that its “diet” drinks help with weight loss, saying the district court improperly dismissed their arguments and evidence.

Elizabeth Manuel and Vivien Grossman argued their claims were plausible enough to survive [PepsiCo](#)’s summary judgment motion and that the district court judge had improperly decided questions of fact when he dismissed their case.

“PepsiCo has not met the heavy burden of extinguishing the possibility that a reasonable consumer could be misled by Diet Pepsi’s label, and the interpretation plaintiffs allege certainly does not border on fantasy,” they said.

The consumers had [alleged in October](#) that Diet Pepsi is made with the noncaloric sweeteners aspartame, acesulfame potassium and sucralose, which contribute to weight gain and an increased risk of metabolic disease, diabetes and cardiovascular disease. The product’s representation that it is “diet” is, therefore, misleading since the soda won’t help with weight loss, they claimed.

However, in May U.S. District Judge Paul A. Engelmayer [dismissed the case](#) in a summary judgment, ruling consumers generally recognize that diet soft drinks are simply low-calorie and saying the scientific studies cited by the plaintiffs demonstrate an association between the drink and weight gain but not causation.

In their appeal, the plaintiffs argued the question of what message was conveyed by Diet Pepsi’s labeling and advertising was a question of fact that should be decided at trial. They said their interpretation was plausible and that Engelmayer’s decision was based on a “false dichotomy.”

“Indeed, plaintiffs do not deny that consumers recognize diet soft drinks are the sugar-free alternatives to regular soft drinks, but allege that they also expect soft drinks labeled ‘diet’ to help them lose weight or maintain their weight,” they said.

They also argued the only permissible question about the studies at this stage of the case is if they show Diet Pepsi can contribute to weight gain, which the plaintiffs alleged they do.

“At the motion to dismiss stage, a court should not assess the validity of the studies; that process comes later, at any Daubert hearing or at trial,” they said.

The also said Judge Engelmayer improperly denied them leave to amend their complaint, saying they could have produced additional causation evidence.

In a phone interview Monday, plaintiffs' counsel Abraham Melamed said the evidence includes additional scientific studies and consumer surveys.

"Some of it is addressed in passing in the [Diet Dr. Pepper decision](#) that is on appeal in the next few weeks," he said.

Counsel for PepsiCo declined comment.

The plaintiffs are represented by Abraham Melamed of [Derek Smith Law Group PLLC](#) and John K. Weston of [Sacks Weston Diamond LLC](#).

PepsiCo is represented by Andrew S. Tulumello of [Gibson Dunn & Crutcher LLP](#).

The case is Elizabeth Manuel et. al v. Pepsi-Cola Co., case number [18-1748](#) in the United States Court of Appeals for the Second Circuit.

Additional reporting by Rachel Graf. Editing by John Campbell.

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